NO. 33514

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

CONNIE SUE WHITESIDE,
n/k/a Connie Sue Varney,

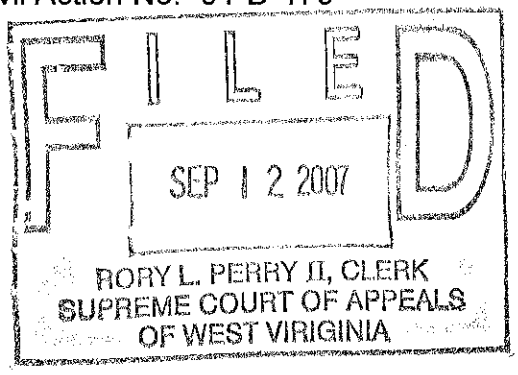
Appellant,

v.

MICHAEL B. WHITESIDE and
EQUITY HOLDINGS, LLC,

Appellees.

From an Appeal to the Circuit Court
of Kanawha County, West Virginia
in Civil Action No. 01-D-179



APPEAL BRIEF OF APPELLEE, EQUITY HOLDINGS, LLC

Keith J. George (WV Bar No. 5102)
W. Bradley Sorrells (WV Bar No. 4991)
Robinson & McElwee, PLLC
Post Office Box 1791
Charleston, West Virginia, 25326
(304) 344-5800
Counsel for Equity Holdings, LLC

Table of Contents

Table of Authorities

Cases

Statutes

Procedural History and Nature of the Ruling in the Family Court

The Whitesides were granted a divorce by Bifurcated Order dated March 23, 2003. The parties' equitable distribution interests were not addressed until a subsequent order ("the Equitable Distribution Order") was entered on February 1, 2005. In the Equitable Distribution Order the Family Court granted Ms. Whiteside $7,150 in "offsets against the husband's interest in" 19 acres of Kanawha County real property ("the Property"), which had a stipulated total value of $15,000. Equitable Distribution Order at 2. These offsets were: a) $884.24 for redeeming the Property; b) $2,360.50 for fees she paid to Steve Thomas for his efforts in preparing and presenting an unsuccessful upset bid for the Property in the Whitesides' Chapter 7 bankruptcy case[1]; and c) $4,000 for one-half the value of a grand piano that Mike Whiteside apparently sold at some point. Id. at 2-3. The Equitable Distribution Order reflects that "the husband has stated on the record that he has no objection to executing a deed conveying his interest in the [Property] to his ex-wife."[2] Id. at 3. However, by deed dated July 23, 2004, Mike Whiteside had already conveyed all of his interest to Equity Holdings, LLC for $6,000, so there was no interest left to convey to Ms. Whiteside.

On September 23, 2005, Ms. Whiteside filed a partition action (Civil Action No.

---

1. In the Equitable Distribution Order Mr. Thomas' efforts in preparing and arguing the unsuccessful upset-bid were characterized as "protecting her property interests in this property before the Bankruptcy Court." Id. at 3.

2. It is not at all clear why Mr. Whiteside did not bring the prior conveyance to the Family Court's attention. Equity Holdings was not a party to this proceeding at that time and it did not learn of that omission until well over a year later, when it learned of the Property Motion. Equity Holdings does not condone a lack of candor with any court, but it can hardly be penalized by an omission long after the Sale, but long before it became a party to this action.

05-C-2159) against Equity Holdings in the Circuit Court of Kanawha County. In that action Ms. Whiteside alleged that she was a co-owner of the Property with Equity Holdings and requested partition under West Virginia Code § 37-4-3. Equity Holdings answered with its own request for partition. Specifically, Equity Holdings requested that the Property be divided roughly in half, with it keeping only the smaller portion that was contiguous with other property that it owned.

On January 18, 2006, Ms. Whiteside filed a Motion to Set Aside Transfer of Property to Third Party and Enforce Final Order ("the Property Motion") within her 2001 divorce case. The Property Motion asserted that in the $6,000 sale of Mr. Whiteside's one-half interest in the Property ("the Sale"), Equity Holdings was not a bona fide purchaser for value and that Mr. Whiteside had merely been attempting to avoid equitable distribution. The Property Motion requested the substantive relief of having the Sale set aside, but Equity Holdings was not named as a party, nor was service of process effected upon it. When Equity Holdings learned of the Property Motion it was forced to file a Motion to Intervene to protect its interests. The Family Court granted leave for Equity Holdings to intervene.

The first action which Equity Holdings took as an intervener was to file its Motion to Dismiss. Although Equity Holdings had the right to file a substantive response to the Property Motion, and the right to request the discovery required to enable it to present such a response, it had valid grounds for seeking dismissal. It therefore chose a Motion to Dismiss as the most efficient first response to the Property Motion. However, before the Family Court acted on the Motion to Dismiss (and before Equity Holdings conducted any discovery or filed a substantive response to the Property Motion), Ms. Whiteside's counsel

had the Property Motion set for final hearing. Equity Holdings protested this precipitous action and filed its Motion to Allow Discovery on August 16, 2006. The case came on for hearing on October 2, 2006, but the Motion to Allow Discovery became moot when the Family Court granted the Motion to Dismiss. The Family Court's ruling was entered by Order dated November 29, 2006 ("the FC Order"). Ms. Whiteside appealed the FC Order to the Circuit Court of Kanawha County and that appeal was denied by Order dated December 11, 2006.

Statement of Facts

The parties agree that the Property is contiguous to a tract of approximately 225 acres which was sold to Equity Holdings in April of 2003 by the Chapter 7 Trustee in the Whitesides' bankruptcy case. See FC Order at 2. Indeed, the Property itself was *almost* sold in its entirety to Equity Holdings by the Trustee. See Whiteside Brief (hereinafter "Brief") at 6. The Trustee requested permission to sell the Property to Equity Holdings and his motion came on for hearing ("the Bankruptcy Hearing") on January 7, 2004. See Transcript of 1/7/04 Bankruptcy Hearing (hereinafter "Br.Tr.") However, the Trustee discovered on the day of the hearing that Ms. Whiteside had made an "upset bid" that seemed to be for a higher amount.[3] Id. at 6. In light of Ms. Whiteside's attempt to out-bid

3. The day before the Bankruptcy Hearing, Ms. Whiteside's "upset-bid" was filed in the form of an "objection," apparently because the deadline for upset bids had passed. See Br. Tr. at 6 (Chapter 7 Trustee states: "It looks like we got an upset bid, albeit it is late.") The objection presented no actual objection to the proposed sale of the Property, but simply offered Ms. Whiteside's upset-bid of $18,400 for the Property. If Ms. Whiteside intended to provide notice of some protected interest, the eleventh-hour "objection" would have been a vehicle for doing so. However, the "objection" did nothing more than attempt to start an untimely bidding war over the Property.

Equity Holdings, the Trustee stated that "if the parties want to have an auction, [he] would be willing to do that." Id.

At the conclusion of the Bankruptcy Hearing, Judge Pearson refused to approve any sale, citing only the upset bid as the sole basis for his refusal: "In light of the upset bid that we have received from [Ms. Whiteside] in this case, we are going to deny the Trustee's motion to sell to Equity Holdings." Br.Tr. at 21. The possibility of a claim by Ms. Whiteside for equitable distribution of the Property was never even mentioned at the hearing – not by Ms. Whiteside, not by her counsel, not by the Trustee, not by Judge Pearson, and not by Equity Holdings or its counsel.

It is therefore patently false that Equity Holdings' presence at the Bankruptcy Hearing gave it "actual knowledge of Ms. Varney's equitable distribution claims." Brief at 13. As a matter of fact, Equity Holdings was given no notice of "equitable distribution claims" because they were not raised or even mentioned. As a matter of law, Equity Holdings had no notice of "equitable distribution claims" because the West Virginia Code provides that as to third parties no interest in equitable distribution even exists "until and unless" it is defined by Order entered under Article 7 of Chapter 48 of the Code.[4] W.Va. Code § 48-7-108.

What ***was*** repeatedly raised at the Bankruptcy Hearing was Ms. Whiteside's fear that Mike Whiteside might get more money than he should for his one-half interest in the Property. Her counsel made very this clear to the Court at the beginning and at the end

---

4. West Virginia Code § 48-7-108 provides: "As to any third party, the doctrine of equitable distribution of marital property and the provisions of this article shall be construed as creating no interest or title in property until and unless an order is entered under this article judicially defining such interest or approving a separation agreement which defines such interest." (Emphasis added).

of the hearing. Early in the hearing, Mr. Thomas advised the Court that Connie Whiteside "was concerned that her husband might borrow more than his half of the money . . . and that's why the objection was filed." Br.Tr. at 10 (emphasis added). At the close of the hearing, he reiterated that position: "And again, just to restate. The reason the upset bid was made was because of Connie Whiteside's fear that some monies had been advanced and that might exceed one-half of the amount." Id. at 24 (emphasis added). The only interest or concern articulated on behalf of Ms. Whiteside was her "fear" that Mr. Whiteside might get "more than his half of the money." Id. at 10, 24.

It is obvious that Judge Pearson was aware of nothing that might impede a future sale of the Property. In fact, he specifically authorized the Trustee to "negotiate a definitive agreement with anybody you want to" or to conduct "an auction, on notice to Equity Holdings and Mrs. Whiteside." Id. at 21 (emphasis added). However, Judge Pearson was aware of the *de minimis* return to the bankruptcy estate and he suggested that a sale of the Property outside of Bankruptcy might be best: "I mean, for $1,000 to the estate, if I were the Trustee, I would consider abandoning [the Property], and just leaving the parties to their own." Id. at 24 (emphasis added). The Trustee followed the pragmatic course suggested by the Judge and abandoned the Property in July of 2004. See Brief at 7. Thus, as Judge Pearson suggested, the parties were left "to their own."

Equity Holdings was certainly put on notice at the Bankruptcy Hearing that Ms. Whiteside was interested in buying Mike Whiteside's Half-Interest when she submitted her untimely, eleventh hour upset-bid. Equity Holdings was aware that Ms. Whiteside intended to offset unspecified claims against the purchase price. Likewise, Ms. Whiteside and her counsel were put on notice that Equity Holdings had a claim against Mike Whiteside for the

$5,000 it had already advanced toward the purchase of the Property, which it intended to credit against the total price. See Br.Tr. at 9, 11, 15.[5]

Shortly after the Chapter 7 Trustee abandoned the Property on July 19, 2004, Mike Whiteside sold his half-interest to Equity Holdings for $6,000 by deed dated July 23, 2004. See Brief at 7. Ms. Whiteside has implied that the Sale was suspect because it occurred "without the approval of the Family Court or the Bankruptcy Court." Brief at 7, Petition at 6, Property Motion at 3. However, there is no factual or legal basis for this implication. The Sale was wholly outside of Bankruptcy Court purview because the Property had already been formally and officially abandoned by the Trustee. Likewise, approval from the Family Court was not required because W.Va. Code § 48-7-108 specifically provides that "[a] husband or wife may alienate property at any time prior to the entry of an order under the provisions of this article or prior to the recordation of a notice of lis pendens."

Standard of Review

The standard of review applicable to this case is:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.

Carr v. Hancock, 607 S.E.2d 803, 804 (W.Va. 2004)

---

5. The Trustee noted (p. 9) that "Mr. Whiteside has already received $5,000 that he agreed to tie [buy] to this property and agreed that it would be back[ed] out of the proceeds of the sale of the property." Mr. Thomas acknowledged (p. 11) that "Mike Whiteside may owe Equity Holdings some amount of money, which today we learn is $5,000." Even Judge Pearson took notice of Equity Holdings' $5,000 claim against Mike Whiteside when he said (p. 15) that "Equity Holdings has a $5,000 investment in Michael Whiteside."

Discussion of Law

The Orders of the Circuit Court and the Family Court Should Be Affirmed Because: A) Equity Holdings Was a Bona Fide Purchaser for Value; and B) There Was No Finding That Mr. Whiteside's Transfer Was A Fraudulent Conveyance or Effected to Avoid Equitable Distribution

A. Equity Holdings Was a Bona Fide Purchaser for Value

1. Equity Holdings Was a Bona Fide Purchaser

Ms. Whiteside argues that Equity Holdings was not a bona fide purchaser because:

> Equity Holdings had actual knowledge of (i) the Whiteside divorce action (ii) Ms. Varney's claims against Mr. Whiteside, and (iii) her intent to credit bid for this Property against these claims. As a result, Equity Holdings had actual knowledge of Ms. Varney's equitable distribution claim, even if the term "equitable distribution was not specifically mentioned during the bankruptcy hearing.

Brief at 13. When these claimed elements of knowledge are examined closely, it is clear that none of them, individually or collectively, disturbs Equity Holdings' legitimate status as a bona fide purchaser.

a) Knowledge of the Divorce

Equity Holdings admittedly had knowledge of the Whiteside's pending divorce. There has never been any dispute about that. Indeed, at the Bankruptcy Hearing that fact was mentioned by all four counsel present, including Equity Holdings' attorney. See Br. Tr. at 4, 11, 13 and 19.

However, the filing of a divorce action is not tantamount to a prohibition on the sale

of property in West Virginia ***unless***: a) an equitable distribution Order has been entered; or b) a notice of lis pendens has been recorded. This is expressly provided by the West Virginia Code: "A husband or wife may alienate property at any time prior to the entry of an order under the provisions of this article or prior to the recordation of a notice of lis pendens." W.Va. Code § 48-7-108. Of course, as is the case for all property sales, a sale may be avoided if it is a fraudulent conveyance. Id.

Because divorces routinely involve property distributions/settlements and other claims, knowledge of a property seller's pending divorce may be considered a "suspicious circumstance" that would put a purchaser "upon inquiry." Subcarrier Communs., Inc. v. Nield, 624 S.E. 2d 729, 737 (W.Va. 2005). This is the case because a corollary of W.Va. Code §48-7-108 is that a husband or wife can ***not*** alienate property ***after*** the entry of an equitable distribution Order or the recordation of a notice of lis pendens. Accordingly, knowledge of a divorce should put a buyer "upon inquiry." In other words, knowledge of a pending divorce imposes a duty upon the buyer to make inquiry sufficient to determine whether such an Order has been entered and whether a lis pendens has been recorded.

As noted in syllabus point 7 of Wolfe v. Alpizar, 637 S.E.2d 623 (W.Va. 2006): "When a prospective buyer of an interest in real estate has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists." Wolfe also speaks in terms of "suspicious circumstances to put him upon inquiry." Id. at 627 (quoting Stickley v. Thorn, 106 S.E. 240, 242 (W.Va. 1921)). In these and similar cases, the "red flag" of "reasonable grounds" or "suspicious circumstances," does not mark the end of the inquiry, but the beginning. The red flag triggers a duty of "reasonable diligence" or "inquiry"

to determine if any actual impediment to the conveyance exists. As expressly noted in Wolfe, in such event the law requires the buyer to "use reasonable diligence to determine whether" the suggested impediment exists. Id. However, nothing in the law suggests that a sale is impaired by the initial "suspicious circumstance" itself, when a reasonably diligent inquiry reveals that there is no underlying problem.

In this case Equity Holdings did exactly what the law requires and its inquiry showed that there was no underlying problem. Equity Holdings had knowledge of the pending divorce (a suspicious circumstance), so it conducted a diligent and proper inquiry to determine that in fact: a) an Order on equitable distribution had ***not*** been entered; and b) a notice of lis pendens had ***not*** been recorded. Having noted the suspicious circumstance, and having conducted the necessary inquiry and finding no underlying problem, Equity Holdings was fully justified in proceeding with the purchase of the Property. Equity Holdings was entitled to rely upon the clear language of § 48-7-108 and is entitled to the protection of that statute.

Ms. Whiteside asks this Court to twist West Virginia law such that mere knowledge of a suspicious circumstance would defeat a party's status as a bona fide purchaser, even if inquiry showed that there was no underlying problem. Here, she suggests that knowledge of the divorce itself somehow impaired Equity Holding's status.[6] If that had been the Legislature's intent, it easily could have enacted a substantially different statute, such as: "Upon the filing of a Complaint for divorce, a husband or wife may not alienate

---

6. In support of this notion Ms. Whiteside has repeatedly presented this Court and the lower courts with a highly misleading, truncated quotation of Equity Holdings' counsel at the Bankruptcy Hearing: "Mr. Standish specifically said, [']well, you have to be careful, I think they are getting a divorce.[']" Brief at 6 (quoting Br. Tr. at 19). This truncation conveys a very different meaning than the full quotation, which concludes with "the whole pot is not his money. You can't go over the 50-50 point there." Br. Tr. at 19.

property until authorized by entry of an order under the provisions of this article." That is not what the Legislature provided in §48-7-108. Instead, the Legislature expressly provided that parties to a divorce were free to alienate property until such time as 1) the Family Court ruled on equitable distribution or 2) a notice of lis pendens was filed by either party. The undisputed facts in this case show that until over six months after the Sale, neither of those events had occurred.

Ms. Whiteside is forced to turn to cases from Alabama and Oklahoma to find anything approaching specific support for her proposition that "where there was actual notice of the pendency of a divorce action, the failure to file a lis pendens [is] irrelevant as to whether the person was a bona fide purchaser for value." Brief at 14. The cases offered by Ms. Whiteside are Breeding v. NJH Enterprises, LLC, 940 P.2d 502 (Okla. 1997) and First Alabama Bank of Tuscalossa, N.A. v. Brooker, 418 So.2d 851 (Ala. 1982). These cases may be correct statements of ***Oklahoma*** and ***Alabama*** law, but they do not correctly present ***West Virginia law***. Beyond the many factual differences between these cases and the instant cases, neither Breeding nor Brooker involves a statute that is even remotely similar to the West Virginia statute that clearly controls here. Neither Breeding nor Brooker considers the issue of "notice of a divorce" in light of a provision in the divorce code that provides: "A husband or wife may alienate property at any time prior to the entry of an order under the provisions of this article or prior to the recordation of a notice of lis pendens." W.Va. Code § 48-7-108. Likewise, neither of these foreign cases considers a legislative mandate similar to that in effect in West Virginia: "As to any third party, the doctrine of equitable distribution of marital property and the provisions of this article shall be construed as creating no interest or title in property until and unless an order is entered

under this article judicially defining such interest or approving a separation agreement which defines such interest." Id.

Under West Virginia law there is no basis for concluding that actual knowledge of a divorce impairs a party's right to purchase property. Accordingly, the ruling below should be affirmed by this Court because it was neither clearly erroneous nor an abuse of discretion.

b) Knowledge of Claims

At the Bankruptcy Hearing it was clearly spread upon the record that Equity Holdings had a $5,000 post-petition claim against Mike Whiteside.[7] The Chapter 11 Trustee noted: "Mr. Whiteside has already received $5,000 [from Equity Holdings] that he agreed to tie to this property and agreed that it would be backed out of the proceeds of the sale of the property." Br. Tr. at 9. Ms. Whiteside's counsel expressly acknowledge that claim: "Mike Whiteside may owe Equity Holdings some amount of money, which today we learn is $5,000." Id. at 11. Even Judge Pearson acknowledged Equity Holdings' claim: "Equity Holdings has a $5,000 investment in Mr. Whiteside." Id. at 15.[8]

Everyone at the Bankruptcy Hearing had actual knowledge of Equity Holdings' claim against Mike Whiteside for the $5,000 it advanced toward the purchase of the Property. As to Ms. Whiteside, that actual knowledge is underscored by her counsel's closing

---

7. Equity Holdings was also the largest unsecured creditor in the Whitesides' Chapter 7 case. However, those claims were pre-petition claims, which were discharged in bankruptcy to the extent they were not secured. On the other hand, the $5,000 advance was made after the bankruptcy petition date. Thus, it was a post-petition claim that could not be discharged in the bankruptcy.

8. Ms. Whiteside takes pains to note that Judge Pearson called Equity Holdings' claim an investment in Mike Whiteside, not in the Property. Brief at 6. Quite apart from failing to explain that this was at most a limitation of bankruptcy procedure that was lifted when the Chapter 7 Trustee abandoned the Property, Ms. Whiteside fails to explain how her own undefined, unliquidated, unquantified, and primarily unrelated claims somehow did attach to the Property.

comments: "And, again, just to restate. The reason the upset bid was made was, because of Connie Whiteside's fear that some monies had been advanced and that they might exceed one-half of the amount." Br. Tr. at 24. There is no doubt that Ms. Whiteside and her counsel had actual knowledge that Equity Holdings had already advanced $5,000 to Mike Whiteside toward the purchase of his half-interest in the Property.

Quite unlike Equity Holdings' fully disclosed claim, Ms. Whiteside's claims were contingent, unliquidated, undefined and not apparently tied to the property. Her counsel defined her claims only in extremely vague terms: "There are obligations that run from Mike Whiteside to Connie Whiteside and so, she intends to offset obligations that are owing to her by her husband. So that will be a matter for the Whitesides to sort out." Br. Tr. at 11. There was absolutely no indication as to the amount of these claims. Her counsel avoided any disclosure with the following disclaimer: "to the extent that Mike Whiteside owes money to her, then that would be an offset against what she would owe him, which would be one-half." Id. at 12. Likewise, there was no indication as to the nature of or the basis for these unidentified claims. If she had wanted to, the Bankruptcy Hearing provided ample opportunity for Ms. Whiteside to assert the position that the Property could not be sold because Mike Whiteside's half-interest was subject to her equitable distribution claims in the pending Family Court proceeding. However, she not only failed to make such an assertion, she did something completely incompatible with her current position, she presented herself to the Bankruptcy Court (and Equity Holdings) as simply another

interested buyer of Mike Whiteside's half-interest in the Property.[9]

The Equitable Distribution Order, entered more that a year after the Bankruptcy Hearing, provided the very first definition of her claims. There we see that the lion's share of Ms. Whiteside's claims turned out to be for a piano ($4,000) and Mr. Thomas' fees in connection with the failed upset bid at the Bankruptcy Hearing ($2,306.50). Equitable Distribution Order at 2-3. Only "$884.24 for one-half (½) of her redemption of said property for non payment of taxes" was even remotely related to the Whitesides' pre-existing the Property. Id. at 2.[10]

Clearly, both parties here had knowledge that the other had some claims against Mike Whiteside. Ms. Whiteside knew the specifics of Equity Holdings' claim, which was well defined as a $5,000 advance on the purchase of the Property. Equity Holdings knew only that Ms. Whiteside might have *some* claim and that if so, it would "be a matter for the Whitesides to sort out." Br. Tr. at 11. In this regard the parties were on more or less equal footing, the only inequality being that Ms. Whiteside had the advantage of full knowledge of Equity Holdings' claim. Just as her knowledge of Equity Holdings' claim has no affect on her attempts to obtain Mr. Whiteside's half-interest, Equity Holding's limited knowledge of Ms. Whiteside's claims has no affect on its acquisition of that interest. Accordingly, the ruling below should be affirmed by this Court because it was neither clearly erroneous nor

---

9. If the case below had progressed to the point that Equity Holdings had filed a substantive response to the Property Motion, it would have asserted that by this conduct Ms. Whiteside was estopped from later advancing her current position. As noted, however, the case in the Family Court never progressed to that point.

10. Equity Holdings believes that discovery would have revealed that Connie Varney redeemed the Lots by paying a total of $974.83 on April 12, 2004 (over three months after the Bankruptcy Hearing), half of which is only $487.41. However, the Property Motion was dismissed before a substantive response or discovery was allowed.

an abuse of discretion.

c. Knowledge of Intent to Offset

Both parties here had knowledge that the other wanted to purchase the Property and intended to offset claims against the purchase price. Ms. Whiteside had actual knowledge that Equity Holdings intended to offset $5,000. However, Equity Holdings had no idea what amount, if any, Ms. Whiteside intended to offset. Equity Holdings knew only that, ***if*** Ms. Whiteside was owed some amount, she intended to offset that amount: "to the extent that Mike Whiteside owes money to her, then that would be an offset against what she would owe him." Br. Tr. at 12. Again, even that vague description was further diluted as being just "a matter for the Whitesides to sort out." Id. at 11.

Ms. Whiteside presents no law to support the proposition that mere knowledge of an unspecified, unliquidated, and unasserted claim, which is not even tied to property, somehow prevents a party from purchasing that property in good faith. Moreover, she offers no explanation of how or why Equity Holdings' scant knowledge of her claims should impair its rights to the Property, while her specific and superior knowledge of Equity Holdings' claims apparently has no impact on her attempts to acquire the same Property. Accordingly, the ruling below should be affirmed by this Court because it was neither clearly erroneous nor an abuse of discretion.

d. Knowledge of Equitable Distribution Claim

Ms. Whiteside attempts to weave knowledge of a) the divorce, b) unspecified claims, and c) the intent to offset those claims, into "actual knowledge of Ms. Varney's equitable distribution claim." Brief at 12. According to Ms. Whiteside, the twisted strands of

'divorce,' 'claims,' and 'intent to offset' form a rope that "is the essence of equitable distribution." Id. This assertion has no basis in the law. The essence of the doctrine of equitable distribution is expressly set forth in the considerations required by W.Va. Code § 48-7-103. Vague and unasserted claims based on post-separation debts are not one of those considerations.

More to the point is the fact that under West Virginia law a third-party cannot be charged with notice of an equitable distribution claim until that claim is established by order. This is expressly provided by statute:

> As to any third party, the doctrine of equitable distribution of marital property and the provisions of this article shall be construed as creating no interest or title in property until and unless an order is entered under this article judicially defining such interest or approving a separation agreement which defines such interest.

W.Va. Code § 48-7-108. Equity Holdings was clearly a "third party" within the meaning of § 48-7-108. Indeed, the Property Motion specifically designates Equity Holdings as a "Third Party" in its full title. However, the plain rule established by that section has been consistently ignored by Ms. Whiteside and her counsel. Equity Holdings cannot be charged with "actual [or constructive] knowledge of Ms. Varney's equitable distribution claim," because as a matter of law there was no such interest vis a vis Equity Holdings or any other third party. Accordingly, the ruling below should be affirmed by this Court because it was neither clearly erroneous nor an abuse of discretion.

2. Equity Holdings Purchased for Value

Ms. Whiteside almost abandons the claim that Equity Holdings did not purchase for value. However, a half-hearted attempt at preservation is found in footnote 3 of the Brief:

"This raises the issue of whether Equity Holdings paid full and adequate consideration for Mr. Whiteside's interest in the Property." Brief at 14. This claim is based only upon an apples-to-oranges comparison of Ms. Whiteside's untimely and failed upset-bid for the whole of the Lots to the actual price Equity Holdings paid for the Half-Interest.[11]

Ms. Whiteside's eleventh-hour upset-bid is illusory and irrelevant. First, the Bankruptcy Court rejected it, stating that "it isn't precise enough for us to pass on it today." Br. Tr. at 21. Second, the Equitable Distribution Order (entered over a year later) shows that Ms. Whiteside stipulated to a value of $15,000: "Both parties have stipulated that the value of this property is $15,000." Equitable Distribution Order at 2. Thus, Ms. Whiteside is bound by her stipulation of value and her untimely and failed upset-bid is of no moment.

Equity Holdings purchased only a one-half interest in the Property. It made that purchase knowing it would become a co-owner with Ms. Whiteside and that at least the added costs of a partition would be incurred over and above the purchase price. The sum of $6,000 was a reasonable price for an undivided half-interest and establishes that Equity Holdings purchased Mr. Whiteside's half-interest in the Property for value. Accordingly, the ruling below should be affirmed by this Court because it was neither clearly erroneous nor an abuse of discretion.

---

11. It is noteworthy that when Ms. Whiteside attempted to acquire Mike Whiteside's half-interest in the Family Court she did so with a credit for claims of only $7,150.74. See Equitable Distribution Order at 2-3 (844.24 + 2,306.5 + 4,000 = $7,150.74).

B. There Was No Finding That the Transfer Was a Fraudulent Conveyance or Effected to Avoid Equitable Distribution.

It is clear from the statute that even if the Family Court had found that Equity Holdings was other than a bona fide purchaser for value, it could have avoided the Sale only with a second finding "that the transfer was effected to avoid the application of the provisions of this article or to otherwise be a fraudulent conveyance." W.Va. Code § 48-7-108. However, as Ms. Whiteside correctly notes, the Family Court "made no findings regarding whether Mr. Whiteside transferred the Property to deprive Ms. Varney of her right to equitable distribution." Brief at 17.

The lack of such a finding is not surprising, since there was absolutely no evidence presented on this issue.[12] Ms. Whiteside has consistently presented it as a given that Mike Whiteside "transferred the Property to deprive Ms. Varney of her right to equitable distribution." Brief at 17. But she never presented a shred of evidence in support of her conclusion.[13]

With no evidence presented on the issue and without the required finding by the Family Court, there is no basis for Ms. Whiteside's request that this Court simply set aside the transfer. At best, she would be entitled to a remand for proper resolution of this issue following full development of the case by the parties. Accordingly, even if this Court finds fault with the ruling below, it should not reverse and set aside the transfer as requested by

---

12. The fact that the Family Court ruled that Equity Holdings ***was*** a bona fide purchaser for value removed the need to make any finding on this second-prong issue. Since the limited avoiding provision of § 48-7-108 requires both prongs to be satisfied, a failure at either prong is sufficient to end the inquiry.

13. Equity Holdings filed a Motion to Allow Discovery so that it might develop evidence on this issue. That Motion was set for hearing on October 2, 2006, but was never ruled upon and became moot when the Family Court granted the Motion to Dismiss.

Ms. Whiteside. In that event this Court should only remand for full development of the both prongs of the limited avoidance provisions of W.Va. Code § 48-7-108 and resolution on the merits by the Family Court.

CONCLUSION

The finding that Equity Holdings was a bona fide purchaser for value was neither clearly erroneous nor an abuse of discretion. The finding was well supported by the undisputed facts. Equity Holdings knew of the divorce, but it made the necessary inquiry to determine that: a) no Order on equitable distribution had been entered in the Whitesides' divorce; and b) no lis pendens had been recorded. Further, the finding was well supported by the law because West Virginia Code § 48-7-108 expressly provides that "[a]s to any third party, the doctrine of equitable distribution of marital property . . . shall be construed as creating no interest or title in property until and unless an order is entered under this article judicially defining such interest." On this basis alone this Court can and should affirm the Family Court's decision in this case.

In any event, this Court should not grant the relief requested by Ms. Whiteside because that relief would only be available after a specific finding by the Family Court. However, as even Ms. Whiteside acknowledges, the Family Court "made no findings regarding whether Mr. Whiteside transferred the Property to deprive Ms. Varney of her right to equitable distribution." Brief at 17. Accordingly, Ms. Whiteside is not entitled to the relief she requests.

For all of the foregoing reasons, this Court should affirm the Orders of the Circuit Court and the Family Court in this case.

Respectfully submitted,

EQUITY HOLDINGS, LLC,

By counsel

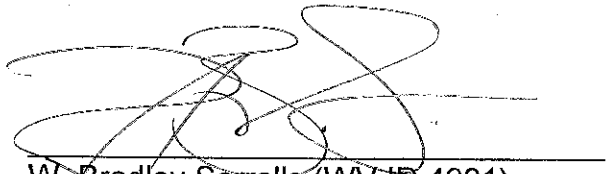
Keith J. George (WV ID 5102)
W. Bradley Sorrells (WV ID 4991)
Robinson & McElwee, PLLC
Post Office Box 1791
Charleston, West Virginia 25326
(304) 344-5800

CERTIFICATE OF SERVICE

I, W. Bradley Sorrells, counsel Equity Holdings, LLC, hereby certify that on this 12th day of September, 2007, I served the foregoing **Appeal Brief of Appellee, Equity Holdings, LLC** upon the parties or their counsel by depositing true copies thereof in the United States mail, postage fully paid, in envelopes addressed as follows:

Steven L. Thomas
Kay Casto & Chaney PLLC
Post Office Box 2081
Charleston, WV 25327-2031
Counsel for Connie Sue Whiteside

Michael B. Whiteside
310 Wise Drive
Malden, WV 25306



W. Bradley Sorrells (WV ID 4991)